NOS. 14-840, -841

In the Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
ELECTRIC POWER SUPPLY ASSOCIATION, *ET AL*.,
Respondents.

ENERNOC, INC., *ET AL*.,
Petitioners,
v.
ELECTRIC POWER SUPPLY ASSOCIATION, *ET AL*.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT STATES' REPLY BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY

Pursuant to Rule 25.3 of the Supreme Court Rules, Respondents, the Maryland Public Service Commission (Maryland PSC) and the Pennsylvania Public Utility Commission (Pennsylvania PUC) (collectively, "Joint States")[1] respectfully submit this Reply Brief on the merits in support of Petitioners Federal Energy Regulatory Commission (FERC) and EnerNOC, Inc. et al.

After a prolonged absence from the issues being litigated in this case, *amici* the North Carolina Public Utilities Commission, et al., the State of Indiana, et al., and the Public Service Commission of the State of New York (collectively "the *Amici* States") have arrived at the eleventh hour to oppose FERC jurisdiction over demand response resources.[2] Despite strong

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[1] In our Brief in Support of Petition for Certiorari filed jointly with the California Public Utilities Commission and the Pennsylvania PUC, and our Brief on the Merits filed jointly with the Pennsylvania PUC, we referred to ourselves as the Joint States. (The California Commission filed a separate brief on the merits also supporting FERC's jurisdiction over demand response). At that time, all state commissions in this case and in the proceeding before the D.C. Circuit Court supported FERC's exercise of jurisdiction over demand response participation in the wholesale markets. Recently, however, the North Carolina Public Utilities Commission et al. and the States of Indiana et al. decided to speak to the issues in this case by filing *amici* briefs in support of Respondents. Nevertheless, to be consistent with the terminology in our previous briefs, we will continue to refer to ourselves as the Joint States.

[2] Several states inflated their presence in this case by signing onto the Amicus brief of North Carolina et al. in addition to the brief for

lamentations that FERC has "forced" a federal paradigm on unwilling states, however, the *Amici* States fail to demonstrate any actual harm resulting from FERC's Rule, including any evidence that they have been "forced" to do anything. FERC has acted carefully through its series of demand response orders to ensure that it does not intrude impermissibly on the states' retail jurisdiction, including by providing an opt-out provision that enables any state to unilaterally prevent wholesale demand response resources existing within the state's borders from participating in FERC's markets. Ironically, even while touting a states' rights mantra, the *Amici* States would have this Court severely restrict states' rights by requiring the removal of demand response from wholesale markets. That result would prevent states like Maryland and Pennsylvania from utilizing their demand response resources in wholesale markets, thereby hurting our ratepayers and impairing our environmental and policy objectives. Finally, the *Amici* States offer an untested concept of how state-run demand response could be utilized by FERC on the demand-side of its capacity market. That concept should be disregarded for being outside the scope of this case as well as constituting a deeply flawed model.

Indiana et al. Those states filing twice include Alabama, Arizona, Idaho, Kansas and South Carolina.

ARGUMENT

I. FERC'S RULE DOES NOT INTERFERE WITH THE STATES' RETAIL MARKETS

A. All States Remain Free to Opt Out of Wholesale Demand Response Initiatives

The *Amici* States claim that FERC's Order No. 745 imposes a federal model regarding demand response resources and inhibits the authority of states to regulate the resource at the state level. Given the breadth of the opt-out provisions provided in FERC's orders on demand response, that assertion is demonstrably false.

Both the North Carolina and the Indiana briefs are replete with claims that FERC has injured state interests by imposing its Rule on unwilling state regulators. *See* Indiana Brief at 3, stating "it is simply bad public policy to *<u>force</u>* States to adopt a regulatory model they have deemed unsuitable for the particular needs of their residents;" and North Carolina Brief at 3: "FERC cannot extend its long federal arm beyond proper wholesale participants … to *<u>entrap</u>* non-wholesale participants, retail consumers, and thereby attach jurisdiction to practices involving demand response by retail customers." (Emphasis added). Indiana et al. proceed to charge that FERC has "*<u>push[ed]</u>* retail customers into the federally regulated wholesale markets," "*<u>lure[d]</u>* consumers," and "improperly *<u>mandate[d]</u>* a one-size-fits-all federal solution." Indiana Brief at 1, 3, 22.[3] Those

[3] *See* also Indiana Brief at 4, stating that FERC has attempted to "force on the entire Nation a novel, untested, one-size-fits-all

characterizations simply fail to accurately describe the intent and effect of FERC's orders relating to demand response.

Contrary to the allegations of the *Amici* States, FERC respected the states' historic jurisdiction over retail procurement and rates by providing that any state may prohibit demand response resources within its boundaries from participating in FERC wholesale markets. Specifically, the agency required that Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") accept wholesale bids from demand response resources "unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate."[4] Indeed, FERC stated unequivocally that it "is not requiring actions that would violate state laws or regulations. The Commission also is not regulating retail rates or usurping or impeding state regulatory efforts concerning demand response."[5] FERC thereby

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approach to regulation of retail electricity transactions…" Aside from the opt-out discussed above, which clearly prevents FERC from forcing any demand response regulation on any unwilling state, the *Amici* States are wrong to call FERC's Rule novel or untested. FERC has over a decade of experience in regulating demand response in wholesale markets and customers have achieved enormous benefits from its use, including reliability, competitive, and market mitigation benefits with hardly a grumble from the *Amici* States during that time.

[4] *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 (2008) (FERC Order No. 719), at ¶ 155, 2008 WL 4686146 at * 35.

[5] *Id*. at ¶ 114, 2008 WL 4686146 at * 25.

left states with the ultimate authority over the eligibility of demand response resources within their territories, and merely required that its jurisdictional entities – the ISOs and RTOs – accept the voluntary bids from demand response resources under specified circumstances unless any particular state prohibited the practice.

FERC also carefully avoided intruding upon state authority by leaving to state discretion whether and how to allow Aggregators of Retail Customers (ARCs) to participate in FERC-regulated wholesale markets.[6] Regarding participation, FERC stated that the "Rule also does not make findings about retail customers' eligibility, under state or local laws, to bid demand response into the organized markets, either independently or through an ARC."[7] FERC further clarified that it "does not intend to make findings as to whether ARCs may do business under state or local laws, or whether ARCs' contracts with their retail customers are subject to state and local law. … [W]e leave it to the appropriate state or local authorities to set and enforce their own requirements."[8] The *Amici* States' argument that FERC has forced a federal demand response scheme on unwilling states is therefore wholly without merit. In fact, the gravamen

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[6] ARCs are third-party entities which assemble end-use customers willing to curtail load and then bid their aggregated demand response offers into wholesale markets.

[7] *Wholesale Competition in Regions with Organized Electric Markets*, 128 FERC ¶ 61,059 (2009) (FERC Order No. 719-A), at ¶ 54, 2009 WL 2115220 at * 14.

[8] *Id*.

of their argument is not that FERC exercised its authority over wholesale demand response, but that FERC set a one size fits all rule, which they can avoid by simply opting out of participation in the wholesale demand response program.

B. FERC's Rule Carefully Avoids Regulation of Retail Rates, Including Dynamic Pricing

Curiously, the *Amici* States next criticize FERC for attempting to impose dynamic pricing on state regulators, despite FERC's express statements that it has no such intention. North Carolina et al. contended that "[d]ecisions over retail rates and services such as implementation of dynamic prices are best left to retail regulators …" North Carolina Brief at 6-7. Indiana et al. took a more combative stance by attributing a malicious intent to FERC's Order and claiming that "FERC's objective is to force all States to switch to retail-level dynamic pricing that it prefers, but it lacks authority to do so directly."[9] Indiana Brief at 3.

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[9] In its brief, Respondent EPSA also made unsupported allegations regarding dynamic pricing, charging the Joint States with supporting FERC's Rule only because it obfuscates accountability for real-time pricing policy. EPSA stated (at 42 n. 6): "It is not surprising that a handful of States that favor real-time pricing would file in support of FERC. Any State can adopt real-time retail pricing, but if it does so, it may face complaints from customers who prefer stable rates. FERC has adopted these States' favored policy choices but has obscured responsibility and accountability for that choice." EPSA's accusation is baseless. Neither Maryland nor Pennsylvania has adopted universal real time pricing. Through their briefs to this Court, the Joint States have clearly expressed their support for FERC's jurisdiction over demand response because the resource provides vital reliability, competitive, and market price mitigating benefits. Despite the aggregate benefits

Notwithstanding Indiana's accusations, nothing in the record supports the claim that FERC is conspiring to impose dynamic pricing on unwilling (or even willing) states. To the contrary, the agency has unambiguously articulated that dynamic pricing is an issue that states address at the retail level. FERC made that point clearly when it differentiated wholesale demand response, which is subject to the agency's jurisdiction, from retail level demand response, which is not.

In its regulation, FERC defined demand response generally as a "reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."[10] However, FERC clearly removed from its Rule any reductions in energy consumption that are the result of dynamic pricing. FERC stated that "price-responsive demand," whereby customers reduce demand by responding to rates that are based on wholesale prices, is a "retail-level" demand response, which is outside the scope of its

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of curtailing energy use during peak consumption periods, however, most retail customers – especially residential customers –find the transaction costs associated with optimizing energy use according to hourly pricing to dwarf the economic benefits, which reduces the value of dynamic pricing. In any event, EPSA has conflated two distinct market programs and offered mere speculation regarding the Joint States' intent as support.

[10] *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 at ¶ 2 n. 2 (2011) (FERC Order No. 745), 2011 WL 890975 at * 1, citing 18 C.F.R. § 35.28(b)(4).

regulatory authority.[11] The agency further clarified that "[w]hile a number of states and utilities are pursuing retail-level price-responsive demand initiatives based on dynamic and time differentiated retail prices and utility investments in demand response enabling technologies, these are state efforts, and, thus, are not the subject of this proceeding."[12]

In contrast to retail-level demand response, FERC found that a reduction in the consumption of energy in response to RTO/ISO incentive payments represents "wholesale demand response,"[13] which is the focus of

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[11] FERC Order No. 745 at ¶¶ 1-3 and n. 2. 2011 WL 890975 at * 1. FERC's Rule ensures that "States remain free to authorize and oversee retail demand response programs." *Id*. at 14-15.

[12] FERC Order No. 745 at ¶ 9, 2011 WL 890975 at * 3.

[13] North Carolina et al. took exception to the comment of the Joint States that FERC's Rule "addresses only payments made by wholesale power purchasers for demand response resources used by wholesale-market operators to set the wholesale price." Joint States' Brief at 18. North Carolina et al. argued that "the word 'wholesale' does not modify the words 'demand response resources' because the demand response resources are state retail resources and an integral part of retail transactions." North Carolina Brief at 9-10. North Carolina's argument that the Joint States' word choice demonstrates an implicit admission that demand response resources are exclusively retail transactions is misplaced. In fact, the Joint States used the term "wholesale demand response" 27 times in their Brief on the Merits, making clear that FERC was only exerting jurisdiction over the resource to the extent it participated in wholesale markets. *See* Joint State Brief at 16, stating: "Another manner in which FERC properly limited the effect of its Rule to avoid impinging upon areas of historic state control was in restricting FERC-jurisdictional demand response under the Rule to wholesale demand response."

FERC's Rule.[14] FERC clarified that wholesale demand response occurs when customers provide demand response that acts as a resource in organized wholesale energy markets to balance supply and demand. The FERC-approved tariff provisions that govern how wholesale demand response may bid into and be compensated in wholesale energy, capacity, and ancillary services markets are clearly outside of the states' retail regulatory authority and in any event are unrelated to state decisions regarding dynamic pricing.

C. The *Amici* States Fail to Articulate Any Actual Harm to their Retail Regulatory Authority Resulting from FERC's Rule

Despite their inaccurate accusation that FERC has forced a federal paradigm on unwilling state agencies, the *Amici* States have failed to demonstrate that they are in fact harmed by FERC's Rule. Indiana et al. claim that bidding demand response directly into wholesale markets creates concerns "that have led some States to impose restrictions on direct consumer participation in wholesale markets – restrictions that should be respected." Indiana Brief at 25. The Joint States agree and note that they have been. FERC has respected state concerns by authorizing each state to opt out and disallow the participation in wholesale markets of any demand response resources located in that state. FERC has also left to state discretion issues relating to the retail regulation of ARCs. Still, the *Amici* States complain that allowing demand response to be bid into wholesale markets within their boundaries could hinder the ability of their retail

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[14] FERC Order 745 at ¶¶ 1-3, n. 2, 2011 WL 890975 at * 1.

utilities to forecast, plan for and meet demand. Indiana Brief at 26-27. Assuming that determination is accurate, however, the resolution is obvious. States may unilaterally prohibit the participation of demand response resources in wholesale markets within their boundaries, as evidenced by the *Amici* State briefs, which list several states that have elected to opt out.[15]

The only "harm" articulated by the *Amici* States that cannot readily be ameliorated through opting out is the effort required to actually exercise the opt-out, which Indiana et al. imply is an unacceptable burden.[16] "When a state makes a decision about how best to regulate retail electricity sales, it should not be forced

[15] *See* Indiana Brief at 29-31, indicating that the state commissions of Indiana, Iowa, Michigan, and Missouri have elected to opt out.

[16] North Carolina et al. make one additional argument that they have been aggrieved, claiming that FERC's payments to demand response resources change the retail rate. "Payments made to retail customers at issue in this case change the retail rate for those customers, and FERC, not the states, is making the decisions regarding these retail rates." North Carolina Brief at 10. Nevertheless, North Carolina can prevent any pass through of wholesale demand response costs by opting out. Additionally, to the extent North Carolina is arguing that FERC has violated the Federal Power Act's jurisdictional line by changing a retail rate, the courts have routinely upheld FERC's authority to pass through wholesale costs to retail rates. *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 371-72 (1988) ("States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. … When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.") (Internal quotations omitted).

to "opt out" of a federal regime to protect the policy decision it has already made." Indiana Brief at 31-32. It is difficult to accept that argument, however, when the very act of a state agency making a policy decision to utilize retail level demand response exclusively, as the Indiana Commission has done, would appear to comply with FERC's minimal standards for opting out. In any event, the modicum of effort required to add a sentence to a state commission order articulating to FERC that the state has opted out is far too trivial to constitute harm.[17]

D. The *Amici* States Would Severely Curtail State Options Regarding Demand Response

Ironically, despite professing that FERC's Rule has created harm by forcing a federal model of demand response on unwilling states, the remedy advocated by the *Amici* States is to affirm the D.C. Circuit's decision, thereby foreclosing the ability of *any* state to bid wholesale demand response resources into FERC's markets. North Carolina et al. made that point clearly when they stated: "Only the retail supplier should be

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[17] Indiana et al. explained that during the FERC proceeding in Order No. 719, the National Association of Regulatory Utility Commissioners advocated on behalf of the state regulators for an "opt-in" provision that would prevent retail customers from participating in wholesale markets unless the relevant state commission or local regulator affirmatively allowed it. Although there is nothing conceptually objectionable about an opt-in provision, the Joint States would hope that the fate of a resource as vital to wholesale markets as demand response would not rest on the tenuous differences between an opt-in and an opt-out requirement.

able to offer retail consumers demand response programs as a service." North Carolina Brief at 6.

North Carolina et al. pejoratively referenced the Maryland PSC's state demand response program that utilizes payments from the wholesale market to fund in part its incentive program to retail customers, stating: "Unfortunately, having ceded its jurisdiction over demand response to FERC, Maryland will have a revenue shortfall to pay the retail participants if the D.C. Circuit decision is upheld…" (North Carolina Brief at 8). The premise of the charge is false, however, and betrays a fundamental misunderstanding of what FERC expressed in its Rule. Maryland has not ceded its authority over demand response to FERC or anyone else. The Joint States are free to run state-level demand response programs just as North Carolina does and FERC has no authority to interfere, as the agency readily admits. Beyond the state-level demand response programs, states may also (i) allow demand response resources to participate in FERC's wholesale markets, through ARCs or directly, and (ii) participate directly by having retail utilities bid aggregated demand response resources into wholesale markets, utilizing the wholesale payments to pay down a portion of the program costs, as Maryland has done. The position of the *Amici* States, however, is that the second two options should not be available to Maryland or any other state. Paradoxically, therefore, despite touting a states' rights position, the *Amici* States are acting to restrict state options, not expand them.

The Joint States believe that a cooperative approach with FERC that broadens the opportunities for demand response to participate in both wholesale and retail markets presents the best path forward. We disagree with the statement of North Carolina et al. that "the state, not the federal government, is in the best position to make decisions on demand response necessary to accurately support the best interests of its citizens." From a policy perspective, there is simply no reason to limit demand response to the state-level exclusively.[18] Wholesale demand response provides vital competitive, market price mitigation, and reliability benefits in the wholesale markets that simply cannot be replicated at the state level. Additionally, it is beyond the states' jurisdictional reach to set the wholesale rates, terms and conditions of service for demand response to participate in wholesale markets. And notwithstanding the arguments of the *Amici* States, there is no reason to choose between retail and wholesale demand response. The wholesale demand response programs facilitated by FERC with active involvement by states compliment rather than threaten the state retail initiatives. In that regard, the Joint States agree with the statement of the Environmental Coalition that the many regulatory challenges facing state and federal regulators "benefit from coordination, rather than

[18] The Joint States agree with FERC that "demand response is a complex matter that lies at the confluence of state and federal Jurisdiction." FERC Order No. 745 at ¶ 114, 2011 WL 890975 at * 30. Because the wholesale demand response that is the subject of this case involves the decision of end-use customers to curtail electric consumption, on one hand, as well as the rules for participation and compensation in FERC jurisdictional wholesale markets for a resource that is comparable to generation, on the other, it is best regulated cooperatively as FERC has provided in its Rule.

jurisdictional brinksmanship and from the '[c]autious' approach, toward preemptive authority (in either direction) that FERC followed here." Environmental Coalition Brief at 30, citing *Oneok, Inc. v. Learjet, Inc*., 135 S. Ct. 1591, 1599 (2015).

II. THE PROPOSALS TO RESTRUCTURE DEMAND RESPONSE MARKETS STAND OUTSIDE THE SCOPE OF THIS CASE AND ARE DEEPLY FLAWED

Several *amici* posited theories that affirmance of the D.C. Circuit's decision would pose little challenge because states would simply take over the role currently held by FERC, or FERC and the states would otherwise reassign responsibilities to accomplish the same goals being met now. That much-ado-about-nothing conjecture is dangerously misguided, because it underestimates the irreplaceable role played by FERC in facilitating the participation of demand response in wholesale markets and exaggerates the authority of states to replicate those functions. It also underplays the importance of this case, suggesting that the parties have brought to the Court merely the esoteric question of which regulator should wear the demand response hat, when in fact billions of dollars and the health of FERC-jurisdictional markets are at stake.

Indiana et al. appear to have suggested that demand response could be bid into wholesale markets by state agencies even if the Court finds that FERC does not have jurisdiction. *See* Indiana Brief at 33, stating: "Nor would affirmance here foreclose demand response at the retail level in traditionally regulated States. After all, Order 719 will ensure that retail customers may continue to bid their demand response directly into the wholesale market if their State permits that practice. And States will remain free to set the price for that demand response as they see fit (or not)." But the source of FERC's jurisdiction over demand response that authorized it to issue Order No. 719 is the same as that for Order No. 745.[19] It is unclear how a FERC-jurisdictional entity such as an RTO or ISO could accept bids for demand response resources in their wholesale markets if FERC has no jurisdiction over the resource. PJM's Tariff, for example, contains extensive FERC-approved provisions regarding how demand response may be bid into and compensated in wholesale energy, capacity and ancillary services markets. If demand response is ultra vires to FERC – as Indiana et al. have advocated – PJM's FERC-approved tariff provisions relating to demand response will be void. Indiana's suggestion that the status quo could continue largely unchanged seems fanciful.

North Carolina et al. articulated a proposal whereby demand response could be "bid into the wholesale capacity market, as a demand-side bid as opposed to a supply-side bid." North Carolina Brief at 10. The State of New York offered a similar idea, claiming that FERC "can foster demand response by adjusting wholesale electric 'installed capacity' requirements for each [RTO] or [ISO] in a manner that would account for electric demand reductions" brought about through

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[19] As detailed in the Joint States' Brief on the Merits (at 8), FERC's jurisdiction over wholesale demand response stems from the "affecting" language of sections 205 and 206 of the Federal Power Act.

state efforts. New York Brief at 6. New York elaborated that the RTOs and ISOs "would then reflect FERC adjustments to reduce the capacity-purchasing requirements that they impose upon retail electric utilities within their control areas." *Id*.

The Court should give no weight to the proposals of North Carolina et al. and New York for several reasons. First, there is nothing in the *EPSA* record to support the viability of using demand response as a demand-side bid. The proposals are simply outside the scope of this proceeding. Second, the North Carolina et al. and New York plans each address changes to FERC's wholesale *capacity* markets. In contrast, the *EPSA* case involves a challenge to FERC's jurisdiction over demand response in wholesale *energy* markets. To be sure, several parties, including the Joint States, have argued that the Court's ruling in this case will have profound implications to FERC's wholesale markets in general. But if the Court finds FERC lacks jurisdiction over demand response, North Carolina et al. and New York cannot save wholesale energy markets by proposing a profound reworking of its wholesale capacity markets. Third, the plan to adjust the installed capacity requirements "to account for peak demand reductions" effectuated by state-run demand response ignores the fact that RTOs and ISOs currently use demand response for several essential purposes other than peak demand reductions. For example, RTOs and ISOs employ demand response during emergencies as an energy substitute, such as when generating units or transmission lines unexpectedly fail.[20] The resource is also used to reduce congestion on transmission lines that would otherwise incur higher transmission charges.[21] Perhaps most importantly, demand response provides vital competitive benefits, by reducing price volatility through its disciplining effect on wholesale market prices and by mitigating market power in uncompetitive markets.[22] Using demand response on the demand-side to reduce the amount of capacity a load serving entity is required to purchase would not serve any of those benefits. Indeed, of the five essential wholesale benefits FERC determined that demand response provides, the proposals of North Carolina et al. and New York would meet only one. *See* Joint State Brief on the Merits at 10-11.

An additional problem with the proposals of North Carolina et al. and New York, and any proposal to utilize state-level demand response programs exclusively, is that they will lead to a balkanized platform for demand response that will relinquish the tremendous market efficiency achieved through administration of demand response in FERC's ISOs and RTOs.[23] Over more than a decade, RTOs and ISOs

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[20] FERC Order No. 719-A, at ¶ 47, n. 76, 2009 WL 2115220 at * 12.

[21] *Demand Response Compensation in Organized Wholesale Energy Markets*, 137 FERC ¶ 61,215 (2011) at ¶ 23 n. 51, (FERC Order No. 745-A), 2011 WL 6523756 at *6 n. 51.

[22] FERC Order No. 719-A at ¶ 47, 2009 WL 2115220 at * 12.

[23] The balkanization issue does not pose as significant a problem for New York, which constitutes a single state ISO. *See* New York Brief at 2, providing that "the State of New York is within a single

have developed market rules to optimally utilize demand response resources in energy, capacity and ancillary services markets. Those RTOs and ISOs encouraged the participation of demand response resources through clear and consistent provisions addressing bidding, dispatch, and compensation. North Carolina et al. and New York, in contrast, would require that each state patch together individual rules for participation of demand response resources at the retail level, with no clear mechanism for monetarily incentivizing such resources to participate. This approach would exponentially increase the difficulty to RTOs and ISOs of forecasting future demand, given that each state would evaluate and verify its demand response resources under different criteria. Furthermore, retail-level demand response programs would not be firm resources, in the sense that they would not be visible to RTO or ISO grid operators and would therefore not be dispatchable as an energy, capacity or ancillary services resource.

CONCLUSION

For the reasons discussed above, the Joint States respectfully request that the Court reverse the Majority decision of the U.S. Court of Appeals for the D.C. Circuit and find that FERC possesses authority to regulate wholesale demand response and that its

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wholesale electricity market managed by the New York Independent System Operator ("NYISO"). The NYPSC is the only state public utility commission within the NYISO footprint." Nevertheless, the vast majority of states that exist within FERC's organized markets do not constitute single-state ISOs and would face a severe loss of economic and dispatch efficiency if demand response were removed from wholesale markets.

decision regarding the compensation of demand response is not arbitrary and capricious.

Respectfully submitted,

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